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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 JENNIFER L. O'NEILL,

4 Plaintiff,

5 v.

11 Civ. 9128 (PGG)

6 MERMAID TOURING, INC. and
7 STEFANI GERMANOTTA,

8 Defendants.

9 New York, N.Y.
10 September 13, 2012
2:30 p.m.

11 Before:

12 HON. PAUL G. GARDEPHE,

13 District Judge

14 APPEARANCES

15 SNITOW KANFER HOTZER & MILLUS

Attorneys for Plaintiff

16 BY: PAUL F. MILLUS

VIRGINIA K. TRUNKES

17 PROSKAUER ROSE

18 Attorneys for Defendants

19 BY: STEVEN D. HURD

BRIAN J. GERSHENGORN

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(Case called)

MR. MILLUS: Paul F. Millus, Snitow Kanfer Holtzer & Millus.

MS. TRUNKES: Virginia Trunkes, also from Snitow Kanfer Holtzer & Millus for the plaintiffs.

MR. HURD: Steven Hurd and Brian Gershengorn on behalf of defendants from Proskauer Rose.

THE COURT: This is a status conference in this case. The parties have sent correspondence to me which raises the following issues:

First of all, defendants indicate they wish to file a motion for partial summary judgment.

Secondly, defendants have asked me to impose sanctions against plaintiff's counsel for violation of the protective order.

Third, there is a motion to quash the subpoena served by the plaintiff on a photographer.

These are the matters I intend to address at the conference today. Let me begin with the proposed motion for partial summary judgment. Let me ask defense counsel, I assume you are not suggesting seriatim summary judgment motions but this will be your summary judgment motion. Am I correct?

MR. HURD: That is correct, your Honor.

THE COURT: What is the status of discovery outside of the issue about the subpoena to the photographer? Are there

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1 any other outstanding issues?

2 MR. HURD: None from defendant, your Honor.

3 MR. MILLUS: There are quite a few from plaintiff's
4 standpoint, your Honor.

5 There is a binder that we have requested. It was
6 reviewed by the witness prior to her deposition,
7 Ms. Germanotta. She relied on it during the course of her
8 testimony. We called for its production. We understand a
9 response, whatever that response will be, will come in next
10 week. Therefore, that is still an open matter. We don't know
11 what the outcome is going to be.

12 In addition, your Honor, Ms. Germanotta gave an
13 interview to Vogue magazine. In that interview I alluded to
14 one of the statements made in one of my letters to your Honor
15 that I believe go to Ms. Germanotta's credibility. We sent a
16 request for admissions last week just to admit that these
17 statements in fact were made to the author, so there is no
18 issue.

19 We also notified the parties that if there is an
20 issue, we are adding the author's name to our witness list
21 under Rule 26 just in case we had to call the reporter at trial
22 to verify that the statements were made which we believe go
23 directly to Ms. Germanotta's credibility, which will also be an
24 important component of this, as she is the primary witness
25 against my client in terms of the work that was performed and

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1 the hours.

2 That's outstanding insofar as discovery is concerned,
3 in addition to the motion to quash that pertains to the
4 photographs that we seek to have produced.

5 One other matter, your Honor.

6 MS. TRUNKES: There may be an electronic discovery
7 issue as well.

8 MR. MILLUS: I apologize, your Honor. There was an
9 account, House of Gaga e-mail account, that we have been trying
10 to find out information on. We have been told that it was
11 destroyed, whatever that means, shortly after our client's
12 termination.

13 The problem is is that under the law I think we have
14 to know that what efforts were made, how it was destroyed, is
15 it recoverable, because we all know that you may try to destroy
16 an e-mail account, but it doesn't necessarily go that route.
17 We have been in the middle of some correspondence -- we have
18 not gotten a response to our last letter to counsel --
19 regarding what the status of it is. We believe we have a
20 credible case to demonstrate that they do have to do more than
21 simply tell us that an e-mail account that may have pertinent
22 e-mails relative to my client's work history was simply
23 destroyed. We need more information on that and we have
24 requested it, have not received a response yet.

25 Those are the outstanding issues from our standpoint,

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1 your Honor.

2 THE COURT: The discovery deadline was September 4.
3 It's now September 13. So whatever the outstanding issues, and
4 I am going to address the motion to quash in just a moment, but
5 with respect to the other issues that have been alluded to,
6 they need to be wrapped up very quickly because what I want to
7 have happen here, it seems to me, based on the correspondence
8 that I have gotten, that there is a fundamental legal issue
9 that needs to be resolved, and I would like to schedule that
10 for briefing, and I'd like to get the briefing in as soon as
11 possible because it seems to me if a legal issue can be
12 resolved, it may well permit the parties to reach a negotiated
13 settlement here.

14 We will talk in a moment about what would be an
15 appropriate briefing schedule on the proposed motion, but I
16 just wanted to tell you that where this is going is, I want
17 discovery completed and completed quickly so that we can go
18 into briefing on a legal issue that's been presented so that I
19 can resolve that.

20 With respect to the motion to quash, I am not going to
21 strike the motion to quash. The motion to quash does not
22 violate my rules because I have special rules for discovery
23 motions, and this is in the nature of a discovery dispute.

24 What I will say about the motion, which the plaintiff
25 has not yet responded to, is it's highly unlikely that I am

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1 going to order a photographer to turn over tens of thousands of
2 images that he took. Is it a he or she? Is it Terry?

3 MR. HURD: It's a he.

4 THE COURT: That he took while he was, I guess,
5 touring with Ms. Germanotta.

6 I don't say that to discourage you, Mr. Millus, from
7 pursuing the matter, but I just want you to know that it seems
8 to me it imposes enormous burden on the nonparty to the case.
9 And if that's where this is headed, it's unlikely I am going to
10 tell the photographer to produce tens of thousands of images.
11 He represents that he can't search for whatever it is you might
12 be looking for. So at present it seems like it would put an
13 enormous burden on him. You're welcome to brief the matter,
14 but that's my initial reaction.

15 MR. MILLUS: Your Honor, if I may make one statement
16 regarding that. I appreciate that point. Our position is,
17 obviously, they failed to keep records, so in some respects
18 it's their burden to demonstrate that we are incorrect when my
19 client says she worked the hours she worked.

20 However, issues were raised during the course of Ms.
21 Germanotta's testimony whereby she said my client was not
22 available. My client was not present during such things as
23 quick changes during the show.

24 And the thing is, Ms. Germanotta always had the
25 photographer around taking thousands of pictures. If they are

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1 going to stand there and say, she wasn't around, I'd like to be
2 able to rebut that with anything that I can. Obviously, a
3 snapshot is a moment in time, but there may be many moments in
4 time because I'm sure the photographs are dated, timed. That's
5 what happens digitally. I am not quite sure I necessarily
6 agree at this point because I don't know how difficult it would
7 be to produce digital photographs. I'm not talking going
8 through a book. We are talking about something that's on a
9 computer. And unless they demonstrate otherwise, I still think
10 we have a viable discovery demand there.

11 THE COURT: When can you get in your opposition to the
12 motion to quash?

13 MR. MILLUS: Two weeks, your Honor, if that's
14 acceptable.

15 THE COURT: No quicker than that? Because the more we
16 spend time on these matters --

17 MR. MILLUS: By next Friday, your Honor.

18 THE COURT: That will bring us to September 21. Then
19 is the defendant or, I should say, counsel for Mr -- is it
20 Mr. Richardson, want to put in a reply?

21 MR. HURD: I believe so, your Honor, but it would be
22 short. Maybe if we could have ten days.

23 THE COURT: How about a week. 9/28. Reply due on
24 9/28 and the opposition on 9/21.

25 On the motion for sanctions I've looked at the papers

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1 and I guess let me say for the record what the issue is. I
2 received a letter from defense counsel dated September 6 in
3 which counsel alleges that Mr. Millus, plaintiff's counsel,
4 violated the terms of the protective order in this case by
5 giving an interview in which he allegedly made some disclosures
6 about Ms. Germanotta's deposition. And specifically the letter
7 from defense counsel states that Mr. Millus stated that Ms.
8 Germanotta had indicated that she would like to contest the
9 matter in court, that based on her deposition he believed the
10 case, that is to say the plaintiff's case, was strong, that at
11 this point there is nothing to stop it from going to trial,
12 that is to say, there is nothing to stop the case from going to
13 trial. And then finally defense counsel points out that the
14 article states that Ms. Germanotta "swapped the stage for the
15 stand in a six-hour videotaped deposition." Let me address
16 these alleged disclosures which are claimed to be in violation
17 of the protective order.

18 First of all, let me say that the fact that we have
19 been involved in litigating this case for quite some time now
20 indicates that the defendants, obviously, are contesting it.
21 Otherwise, none of us would be here. So I don't think that's a
22 news flash.

23 With respect to counsel's statement that based on the
24 deposition he felt plaintiff's case was strong, I don't see
25 that as violating the protective order in the sense I don't

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1 believe it reveals any of the content of what was said at the
2 deposition.

3 The comment about at this point there is nothing to
4 stop the case from going to trial has nothing to do with the
5 content of the deposition.

6 Finally, the extent to which the article states that
7 Ms. Germanotta swapped the stage for the stand in a six-hour
8 videotaped deposition, I suppose that could be read to suggest
9 that plaintiff's counsel told the reporter that the deposition
10 lasted six hours, but, again, even assuming he said that, I
11 just don't see that as violating the protective order in the
12 sense --

13 MR. MILLUS: Your Honor, may I add for the record --

14 THE COURT: Can I finish?

15 MR. MILLUS: I apologize.

16 THE COURT: I don't see that as disclosing any of the
17 content of the deposition.

18 Go ahead.

19 MR. MILLUS: I'm sorry, your Honor. I do apologize.

20 Just for the record, all I told the reporter was the
21 deposition took about six hours. I didn't make any comment
22 regarding it, just that it took about six hours.

23 THE COURT: In any event, with respect to the remarks
24 about which defense counsel complains, I don't find them to
25 have been a violation of the protective order. Let me make

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1 another comment, which is, I don't want the case tried in the
2 press. This is sort of nibbling around the protective order.
3 I don't find it to be in violation of the protective order, but
4 I would be very disturbed if it went beyond what's alleged. So
5 I am going to ask counsel for both sides to make sure that they
6 are in compliance with the protective order so that we don't
7 have this issue reemerge. But for present purposes the request
8 for sanctions against plaintiff's counsel is denied.

9 Now, let's talk about what might be an appropriate
10 schedule for the motion for partial summary judgment. In light
11 of the discovery issues that apparently need to be worked out,
12 as well as the issue of the motion to quash, what schedule
13 would make sense for briefing on the motion for partial summary
14 judgment?

15 MR. HURD: Your Honor, we are prepared to ask for four
16 weeks, but we thought four weeks from today. If we want to
17 resolve those issues first, I would say four weeks from
18 whatever date you pick to have those issues resolved.

19 THE COURT: Briefing on the motion to quash is going
20 to take us through September 28. Why don't we add to that
21 schedule that to the extent you are not able to work out your
22 other discovery issues, whatever they might be, that the
23 briefing on that will also be concluded by September 28. I
24 will then try to expeditiously resolve all those issues. Why
25 don't we assume for present purposes that the discovery issues

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1 will be resolved by, say, October 12.

2 With that as a deadline for me to resolve whatever the
3 issues are, I suppose in the event I reached a resolution that
4 would require additional discovery, that might require some
5 alteration, but for present purposes let's assume the discovery
6 issues have been resolved and whatever additional discovery
7 needs to take place has happened by October 12. If for some
8 reason it doesn't prove true, we can amend the schedule. For
9 present purposes let's assume everything is resolved by October
10 12. Four weeks from that?

11 MR. HURD: Yes, your Honor, that would be good.

12 THE COURT: That would bring us to November 9. And
13 how long does the plaintiff want for opposition?

14 MR. MILLUS: To the motion for summary judgment, your
15 Honor?

16 THE COURT: It would be partial summary judgment.

17 MR. MILLUS: I look to my colleague. I never like to
18 make these decisions without looking to my colleague as well.

19 THE COURT: Because she is actually going to have to
20 do the work.

21 MR. MILLUS: Pretty much, your Honor. But I am
22 involved.

23 I guess with Thanksgiving coming up, what are we
24 saying, your Honor? When would the motion be made?

25 THE COURT: November 9 would be the date for the

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1 moving papers.

2 MR. MILLUS: We can get it in before Thanksgiving.

3 THE COURT: You want to get it in before Thanksgiving?

4 MR. MILLUS: I think that's the better move, quite
5 frankly.

6 MS. TRUNKES: Let's see how early Thanksgiving is.

7 THE COURT: Thanksgiving is the 22nd, so it is
8 actually pretty early this year.

9 MR. MILLUS: A week after, your Honor.

10 THE COURT: Why don't we say November 30.

11 How long do the defendants want to respond?

12 MR. HURD: Two weeks.

13 THE COURT: That will bring us to the 14th.

14 We will issue an order with all these dates for the
15 briefing on the motion for summary judgment.

16 I would ask you, if you reach a point where you have
17 any impasse on these discovery matters to bring them to me,
18 consistent with my individual rules, as soon as you possibly
19 can and I'll likely set up a telephone conference and try to
20 resolve the matter over the phone with you. But I don't want
21 it to hold up the case. So I encourage you to work it out
22 between yourselves, obviously. But if you can't, don't delay
23 it raising it with me because I want to address it so that the
24 case can move forward.

25 Anything else we should talk about today?

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1 MR. HURD: Not from defendants.

2 MR. MILLUS: Not from plaintiffs, your Honor.

3 THE COURT: Thank you.

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